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No. 91-1438

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BROADCAST MUSIC, INC.,

Petitioner,

—v.—

EDISON BROTHERS STORES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE OF GROUPEMENT EUROPEEN DES SOCIETES D'AUTEURS ET COMPOSITEURS IN SUPPORT OF PETITION

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BRIEF AMICUS CURIAE OF GROUPEMENT EUROPEEN DES SOCIETES D'AUTEURS ET COMPOSITEURS IN SUPPORT OF PETITION

INTEREST OF AMICUS

Groupement Europeen des Societes d'Auteurs et Compositeurs (the European Group of Authors and Composers Societies) (hereinafter "GESAC") was founded in 1990 by authors societies of the European Community on the initiative of Mr. Jean-Loup Tournier, President of the Board of Directors of Societe des Auteurs, Compositeurs et Editeurs de Musique (the Society of Authors, Composers and Music Publishers) (hereinafter "SACEM"), the association of lyricists,

composers and music publishers for France.[1] The principal objective of GESAC is to collaborate with the authorities of the European Economic Community for the implementation of legislation assuring the highest level of protection possible in respect of the intellectual property rights administered by GESAC's seventeen member societies, including SACEM, Gesellschaft fur Musikalische Auffuhrungs und Mechanische ("GEMA", Germany), Sociedad General de Autores de Espana ("SGAE", Spain), and The Performing Right Society Ltd. (hereinafter "PRS").[2] PRS' interest in the decision below is representative of the interest of each of the members of GESAC.

PRS, a non-profit company founded in 1914, is the association of lyricists, composers and music publishers for the United Kingdom and the Republic of Ireland, as well as certain Commonwealth territories. Its purpose is to administer, on behalf of its members, certain rights under copyright legislation. Specifically, PRS licenses, throughout the world, the

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1 SACEM was founded in 1851 to grant licenses and collect royalties for the public performance of its members' (composers, lyricists and music publishers) works. SACEM served as a model for performing rights societies throughout the world, including the United States. Stanley Rothenberg, *Copyright and Public Performance of Music* 27-28 (1954).

2 GESAC's other members include: Societe des Auteurs dans les Graphiques et Plastiques ("ADAGP", France), Societe Hellenique pour la Protection de la Propriete Intellectuelle ("AEPI", Greece), Het Bureau voor Muziek Auteursrecht ("BUMA", The Netherlands), Selskabet til Farvaltning af Internationale Komponistrettighederi i Danmark ("KODA", Denmark), Mechanical Copyright Protection Society Limited ("MCPS", United Kingdom), Societe representant la Scandinavia ("NCB", Denmark), Societe Belge des Auteurs, Compositeurs et Editeurs ("SABAM", Belgium), Societe Civile des Auteurs Multimedia ("SCAM", France), Societe pour l'Administration du Droit de Reproduction Mechanique des Auteurs, Compositeurs et Editeurs ("SDRM", France), Societa Italiana Degli Autori ed Editori ("SIAE", Italy), Sociedade Portuguesa de Autores ("SPA", Portugal), Stichting tot ultoefening en handhaving van mechanische reproduktierechten der auteurs ("STERMA", The Netherlands), Museo Espanol de Arte Contemporaneo ("VISUAL", Spain).

public performance of the copyrighted musical works of its members, collecting due payment for such performances—directly in the United Kingdom and through affiliates and agents elsewhere. That income, less overhead, is then distributed to its members.

Membership in PRS currently totals over 24,000, including about 20,500 living composers and lyricists and nearly 2,500 publishers. Its writer-members have composed many of the world's best loved and most often performed works, including pop songs and television and motion picture themes, as well as serious music. Such works include, for example, "Yesterday" (John Lennon/Paul McCartney), "As Long As He Needs Me" (Lionel Bart) (from the score of *Oliver*), "The First Time Ever I Saw Your Face" (Ewan MacColl), and "(I Can't Get No) Satisfaction" (Mick Jagger/Keith Richards). PRS music is consistently performed on American radio and television. Through its affiliation with similar organizations overseas, including Broadcast Music, Inc. (hereinafter "BMI") and the American Society of Composers, Authors and Publishers (hereinafter "ASCAP") in the United States, PRS represents more than 750,000 copyright owners world-wide.

The United Kingdom has been an adherent to the Berne Convention for the Protection of Literary and Artistic Works (hereinafter "Berne Convention") since 1887. Representatives of PRS have participated in one capacity or another at virtually all of the major international copyright conferences leading up to the 1971 Paris text of the Berne Convention. The other member societies of GESAC are also located in countries with a long affiliation with Berne.[3] GESAC has a great interest in the preservation of harmony between United States law and the law of other nations adhering to the Berne Convention to assure the continued uniformly strong protection of its members' rights under copyright.

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3 For example, France, Germany and Spain were founding members of Berne. *See Copyright: Monthly Review of The World Intellectual Property Organization*, Jan. 1992, at 6, 8.

That harmony is jeopardized by the decision below. For example, currently in the United Kingdom, United States composers receive remuneration for the public performance of their works from establishments such as the ones at issue here. If the decision below is allowed to remain in effect, writers from the United Kingdom, indeed, writers from all Berne Convention member nations, will be denied those compensatory benefits in the United States which are consistently conferred on their United States counterparts throughout the Berne Convention member nations.

SUMMARY OF ARGUMENT

The Eighth Circuit rendered a decision which (i) creates a conflict between United States law and the treaty obligations of the United States under the Berne Convention for the Protection of Literary and Artistic Works, Oct. 31, 1988, S. Treaty Doc. No. 99-27, 99th Cong., 2d Sess. (1986), 828 U.N.T.S. 221 and (ii) is in direct conflict with the Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853 (1988) (hereinafter "BCIA"), the legislation enacted by the United States Congress (hereinafter "Congress") to ensure United States compliance with the terms of the Berne Convention. *Edison Bros. Stores, Inc. v. Broadcast Music, Inc.*, 21 U.S.P.Q.2d (BNA) 1440 (8th Cir. 1992), *petition for cert. filed* (U.S. March 10, 1992).[4] In so doing, the Eighth Circuit has deprived GESAC's societies' members, including PRS' members, of revenue in contravention of United States obligations under the Berne Convention and has jeopardized the position of the United States in the international intellectual property community, thereby harming the United States in the context of its international trade policy.

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4 The Seventh Circuit reached a similar result in *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482 (7th Cir. 1991), *petition for cert. filed*, No. 91-1437 (U.S. March 10, 1992).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Section 110(5) provides a very narrow exemption to the copyright owner's exclusive right of public performance under section 106(4) of the 1976 Copyright Act. The Eighth Circuit incorrectly expanded that exemption at the great expense of music copyright owners throughout the Berne Convention member countries. *Id.* In light of the recent adherence of the United States to the Berne Convention, "the world's premier multilateral copyright treaty", H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 7 (1988), such a split has serious international consequences. The United States, the world's largest exporter of intellectual property, *see* Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, 3 J.L. & Tech. 71, 110 (1988), is not in conformity with the Berne Convention, less than three years after becoming a signatory.

THE DECISION BELOW IMPROPERLY INTERFERES WITH THE TREATY-MAKING POWERS OF THE LEGISLATIVE AND EXECUTIVE BRANCHES

The decision below conflicts with both the Berne Convention and the BCIA. The Berne Convention gives authors the exclusive right to authorize the public performance of their works "by loudspeaker or any other analogous instrument." Berne Convention, Oct. 31, 1988, art. 11 *bis* (1)(iii), S. Treaty Doc. No. 99-27, 99th Cong., 2d Sess. 44, 828 U.N.T.S. at 243. Before enacting the BCIA, Congress determined that the exclusive right of public performance under the 1976 Copyright Act, which at that time was subject only to a narrow "small business" exemption, was in conformity with the Berne Convention. The Eighth Circuit unjustifiably expanded that exemption to include a nationwide business with annual revenues of a billion dollars from its 2,000 retail stores, each with its own unlicensed radio. *See Edison Bros.*,

21 U.S.P.Q.2d at 1441. It is therefore imperative that certiorari be granted in this case.

A. The Decision Below Contravenes The Berne Convention

Article 11 *bis* (1)(iii) of the 1971 Paris text[5] of the Berne Convention provides that "[a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing . . . the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work." Berne Convention, Oct. 31, 1988, art. 11 *bis* (1)(iii), S. Treaty Doc. No. 99-27, 99th Cong., 2d Sess. 44, 828 U.N.T.S. at 243. Article 11 *bis* (1)(iii) first appeared in the 1948 Brussels text, at a time when broadcasting had become increasingly important, and had received a far-from-uniform approach under national laws. Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* 452 (1987) [hereinafter Ricketson].[6] While the broadcast of works in places such as cinemas, restaurants and tearooms was discussed, the drafters were most concerned with the broadcast of works in places "where people worked and conducted their business, such as factories, shops and offices." *Id.* at 453. Similar concerns still exist today. The World Intellectual Property Organization, the secretariat to the Berne Convention, addresses these concerns by offering the following interpretation of Article 11 *bis* (1)(iii):

> [T]he third case dealt with in this paragraph is that in which the work which has been broadcast is publicly communicated e.g., by loudspeaker or otherwise, to the

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5 The Berne Convention was drafted at an international conference in Berne, Switzerland in 1885. It was signed by eight nations the following year. Since then, the Convention has been revised five times. With each successive text, the Convention has increased the rights accorded authors and copyright proprietors. The Paris text was drafted in 1971. It is the only version of the Convention now open to accession. H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 12-13 (1988).

6 Professor Ricketson is the Sir Keith Aickin Professor of Company Law at Monash University in Melbourne, Australia.

> public. The case is becoming more common. In places where people gather (cafes, restaurants, tearooms, hotels, large shops, trains, aircraft, etc.) the practice is growing of providing broadcast programmes . . . . The question is whether the license given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or may not be for commercial ends.
>
> The Convention's answer is "no."

World Intellectual Property Organization, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971)* 68 (1978).

Article 11 *bis* (2) of the Berne Convention states that the national laws which regulate the "conditions" under which the provisions set forth in paragraph (1) may be exercised may not be prejudicial to the right of the author "to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority." Berne Convention, Oct. 31, 1988, art. 11 *bis* (2), S. Treaty Doc. No. 99-27, 99th Cong., 2d Sess. 44, 828 U.N.T.S. at 243. According to Ricketson, the power to impose "conditions" on the exercise of rights does not carry with it the power to deny those rights. Ricketson at 525. In fact, the reference to "conditions" is usually taken to refer to the imposition of compulsory licenses,[7] with the form of those licenses determined by national legislation. *Id.* However, whatever form the compulsory license takes, the license "is not to be prejudicial to the right of the author to obtain equitable remuneration." *Id.* at 527; *see also* Antony Jennings, *Cables and Satellites*, 11 Colum.-VLA J.L. & Arts 129, 137 (1986). In clear violation of Article 11 *bis* (2), the Eighth Circuit has expanded the section 110(5) exemption to force the author to, in effect, grant

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7 Compulsory licensing refers to uses authorized by statute, rather than by the copyright owner, subject to compensation to the copyright owner at a fee fixed by the legislature. *See, e.g.*, 17 U.S.C. § 115 (compulsory license under the 1976 Copyright Act for making and distributing phonorecords).

a gratuitous license rather than a compulsory license for some fixed compensation.

Article 11 *bis* (2) is applicable whenever the public communication is by loudspeaker or any other analogous instrument. Respondent's use of radio receivers in over 2,000 stores is such a communication. Such use is clearly beyond that which is authorized by Article 11 *bis* (1)(iii), and therefore requires equitable remuneration under Article 11 *bis* (2).

B. The Decision Below Contravenes The Berne Convention Implementation Act

The United States became a signatory to the Berne Convention on March 1, 1989. In October of 1988, Congress enacted the BCIA, which amends the 1976 Copyright Act to implement United States adherence to the Berne Convention. In section 2(3) of that Act, Congress expressly declared that

> [t]he amendments made by [the BCIA], together with *the law as it exists on the date of the enactment of this Act*, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

Berne Convention Implementation Act of 1988, § 2(3), Pub. L. 100-568, 102 Stat. 2853 (1988) (amending 17 U.S.C. §§ 101–810) (emphasis added).

Congress thereby established that the law of the United States under the 1976 Copyright Act (as amended by the BCIA) satisfied the United States obligations under the Berne Convention. Until the decision below, the laws of the United States, both statutes and case law, conformed to and did not contradict the exclusive right under Article 11 *bis* (1)(iii) to authorize public communication through a loudspeaker. The decision below violates the policy declared by Congress as it fails to follow United States case law ante-dating the BCIA and complying with the Berne Convention.

C. The Case Law Preceding The Decision Below Represents Congress' Intent And Policy Under The BCIA

Section 110(5) of the 1976 Copyright Act provides a narrow exemption to the author's exclusive right of public communication. That section states that the following kind of public communication is not an infringement of copyright:

> communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public[.]

17 U.S.C. § 110(5).

Section 110(5) represents the legislative response to this Court's decision in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975). In that case, the defendant owned and operated a small fast-food restaurant. The restaurant had a radio which the defendant played throughout the business day through four speakers in the ceiling. Lacking any performing rights license, the restaurant was sued for copyright infringement by two members of ASCAP. The defendant lost in the district court, won a reversal in the Third Circuit Court of Appeals, and prevailed in this Court by a margin of seven to two. That result in *Aiken* was embodied as a narrow exception to the exclusive performance right in the 1976 Copyright Act. The House Report accompanying that Act (enacted one year after *Aiken*) states:

> [T]he Committee considers [the *Aiken*] fact situation to represent *the outer limit of the exemption*, and believes that the line should be drawn at that point. Thus, the clause would exempt *small commercial establishments* whose proprietors merely bring onto their premises stan-

> dard radio or television equipment and turn it on for their customers' enjoyment.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 87 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5701 (emphasis added).

1. *Gap Stores* And *United States Shoe* Were The Established Law Under Section 110(5) At The Time The BCIA Was Enacted

From the date of enactment of section 110(5) until the date of United States adherence to the Berne Convention, federal courts almost invariably followed Congress' mandate that *Aiken* be the "outer limit of the exemption."[8]

The Second Circuit's 1981 decision in *Sailor Music v. The Gap Stores, Inc.*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) was the first appellate decision to discuss the scope of section 110(5). There, The Gap, a chain of 420 retail clothing stores was sued for acts of copyright infringement based on the use of music from a radio receiver at two specified stores. The district court, relying heavily on the House Report, concluded that Congress did not intend to exempt The Gap from copyright liability. 516 F. Supp. 923, 925 (S.D.N.Y. 1981). Finding that the size of The Gap's operation was dispositive, the court refused to allow The Gap the benefits of the Section 110(5) exemption. *Id.* On appeal,

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8 The Eighth Circuit refused to consider the clear congressional mandate concerning the scope of section 110(5), *Edison Bros.*, 21 U.S.P.Q.2d at 1444-45, notwithstanding this Court's recurring reliance on legislative history in the copyright arena. *See, e.g., Stewart v. Abend*, 495 U.S. 207, 110 S.Ct. 1750, 1758, 1763 (1990) (renewal rights); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549, 553-54, 568 (1985) (fair use); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709-11 n.15 (1984) (compulsory licensing); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 447 n.29, *reh'g denied*, 465 U.S. 1112 (1984) (fair use). Indeed, the Eighth Circuit itself has relied on legislative history in interpreting this very section of the 1976 Copyright Act. *See National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 730-31 (8th Cir. 1986).

the Second Circuit affirmed the district court's decision. 668 F.2d 84 (2d Cir. 1981). Focusing on both the size of The Gap's operation and its ability to pay for the use of copyrighted music, the court found the store to exceed *Aiken*'s "outer limit". *Id.* at 86. The Second Circuit therefore concluded that The Gap Stores "had made infringing use of appellee's copyrighted works." *Id.*

The Ninth Circuit applied similar reasoning in *Broadcast Music, Inc. v. United States Shoe Corp.*, 678 F. 2d 816 (9th Cir. 1982). In that case, the court found that the music broadcast in defendant's chain of more than 600 women's apparel stores, fell outside of the section 110(5) exemption. Citing to the "careful and well-reasoned opinion" of *Gap Stores*, the court held that "the size and nature of the operation justifies the use of a commercial background music system." *Id.* at 817. The *United States Shoe* court thus affirmed the lower court's award of summary judgment for BMI, finding that appellants infringed the exclusive right of public performance. *Id.* at 817-18.

In addition to *Gap Stores* and *United States Shoe*, virtually every other case decided since the enactment of the 1976 Copyright Act and prior to United States adherence to the Berne Convention followed the mandate of the House Report and ruled that the section 110(5) exemption is not available to businesses financially capable of paying normal copyright licensing fees for their use of music. *See Merrill v. Bill Miller's Bar-B-Q Enters., Inc.*, 688 F. Supp. 1172, 1176 (W.D. Tex. 1988) ("it is clearly 'practical' for a chain of restaurants, each . . . grossing well over $500,000 annually, to subscribe to a commercial background music service."); *Merrill v. County Stores, Inc.*, 669 F. Supp. 1164, 1170 (D.N.H. 1987) ("defendants' $2.5 million in annual retail sales justifies subscription to a commercial background music system."); *Lamminations Music v. P & X Markets, Inc.*, 1985 Copyright L. Dec. (CCH) ¶ 25,790, at 19,557 (N.D. Cal.

1985) (finding infringement because defendant's operation consisted of a chain of grocery stores).[9]

Indeed, when this Court wants to know the intent of Congress in respect of legislation concerning existing copyright case law, it looks to the House Report. For example, in the discussion of joint works of authorship in the legislative history of the 1976 Copyright Act, Congress expressly states that there is "no need for a specific statutory provision concerning the rights and duties of the coowners [sic] of a work; court-made law on this point is left undisturbed." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 121 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736. Both this Court (and the Ninth Circuit) have noted and respected this express congressional declaration. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 n.15 (1989) (in framing certain provisions of the 1976 Copyright Act, "Congress indicated when it intended to incorporate existing case law.") (citing H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 121 (1976)); *Dumas v. Gommerman*, 865 F.2d 1093, 1102 (9th Cir. 1989) ("[w]here the drafters of the 1976 Act intended to include existing law, they stated that intention clearly.") (citing H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 121 (1976)).

Similar to the description of the rights of co-owners in joint works, in describing the exemption to the exclusive right of public performance, the House Report refers to and incorporates existing case law (i.e., *Aiken*) as the outer limit to this exemption. Moreover, BCIA section 2(3) states that its amendments to the 1976 Copyright Act, together with existing law, satisfy the obligations of the United States in adhering to the Berne Convention. Berne Convention Implementation Act of 1988, § 2(3), Pub. L. 100-568, 102 Stat. 2853 (1988). Nevertheless, the Eighth Circuit ignores these declarations in respect of section 110(5), repudiating

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9 The following cases also based their findings of infringement on the defendants' ability-to-pay, but were decided after the United States adhered to the Berne Convention: *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1038 (D. Mont. 1990); *Crabshaw Music v. K-Bob's of El Paso, Inc.*, 744 F. Supp. 763, 767 (W.D. Tex. 1990).

Gap Stores and *United States Shoe* and gratuitously expanding the *Aiken* exemption. In so doing, the Eighth Circuit ignores express congressional intent that such existing case law become statutory law.

2. The Decision Below Improperly Diminishes Rights That Congress Intended To Preserve

As noted above, Congress expressly declared in section 2(3) of the BCIA that:

> [t]he amendments made by [the BCIA], together with *the law as it exists on the date of the enactment of this Act*, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

Berne Convention Implementation Act of 1988, § 2(3), Pub. L. 100-568, 102 Stat. 2853 (1988) (emphasis added).

When Congress enacts a statute which, like the BCIA, is intended

> to bring the United States into compliance with international law, and when those obligations are reaffirmed by treaty, a court must give careful consideration before it sets aside that which the legislative and executive branches have deemed necessary to fulfill the nation's international responsibilities. It [is] quite improper for the judiciary to disregard international obligations that are inseparable from our nationhood.

Finzer v. Barry, 798 F.2d 1450, 1460 (D.C. Cir. 1986), *aff'd in part, rev'd in part sub nom., Boos v. Barry*, 485 U.S. 312 (1988); *see also United States v. Muench*, 694 F.2d 28, 32 (2d Cir. 1982), *cert. denied*, 461 U.S. 908 (1983) (in interpreting obligations of the Convention on Psychotropic Substances, an international treaty which is expressly not self-executing, the court stated that where Congress has declared that United States drug laws are intended to meet the nation's duties under an international treaty, "[i]t would be absurd to ignore

Congress' expressed intent. . . ."); *United States v. Elder*, 601 F. Supp. 1574, 1581 (S.D. Tex. 1985) ("[t]he Court cannot interfere with political decisions which the United States as a sovereign nation chooses to make in the interpretation" of treaty commitments).

The Eighth Circuit in the instant case has improperly disregarded the congressional declaration of the treaty obligations of the United States under the Berne Convention, carving out an expanded exemption to an author's exclusive right of public performance. *Edison Bros.*, 21 U.S.P.Q.2d at 1446. No logical reading of the Berne Convention and the BCIA would permit a nationwide chain of 2,000 retail stores with annual revenues of a billion dollars to benefit from the "small business" exemption to the right of public performance. Thus, the Eighth Circuit's substantial expansion of the public performance exemption does more than just uproot an established line of federal copyright cases; it flouts a congressional declaration regarding international treaty interpretation.

D. Congress Knew Of And Relied On *Gap Stores* And *United States Shoe* In Adhering To The Berne Convention

It is a well-settled principle that Congress is presumed to be knowledgeable about existing case law pertaining to the legislation it enacts. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988); *Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 319 (1983) (citation omitted); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). In fact, in respect of *Gap Stores* and *United States Shoe*, such a presumption is reinforced by the citation to and reliance upon both decisions by Congress' advisory committee on adherence to the Berne Convention.

In 1985, at the request of the State Department, a group of individuals known as the "Ad Hoc Working Group on U.S. Adherence to the Berne Convention" (hereinafter the "Ad

Hoc Working Group")[10] joined together to identify provisions of United States law relevant to the Berne Convention and to analyze the compatibility of those provisions with the Berne Convention. H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 7 (1988). The Ad Hoc Working Group's mandate was to report to Congress and the Executive Branch on these matters, enabling them to give informed consideration to United States adherence to the Berne Convention. *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, reprinted in* 10 Colum.-VLA J.L. & Arts 513, 514 (1986).

In its *Final Report*, the Ad Hoc Working Group cited both *Gap Stores* and *United States Shoe* to support its finding that section 110(5) was compatible with the requirements of Article 11 *bis* of the Berne Convention on public performance rights. *Id.* at 529 n.23. Congress relied heavily upon the findings of the Ad Hoc Working Group, and cites to its *Final Report* throughout the House Report on the BCIA. *See* H.R. Rep. 100-609, 100th Cong., 2d Sess. (1988) 8 n.5, 31 nn.49 & 57, 32 n.59, 34 n.67, 37 nn.85 & 87, 38 nn.88 & 90, 41 nn.95 & 96, 43 n.101, 47 n.109, 49 nn.114 & 116, 51 n.121a.

Thus, it is evident that Congress was aware of *Gap Stores* and *United States Shoe* and, in the complete absence of any case law to the contrary, may be presumed to have relied on those cases when it stated "[t]he amendments made by this Act, together with *the law as it exists on the date of the enactment of this Act*, satisfy the obligations of the United States in adhering to the Berne Convention. . . ." Berne Convention Implementation Act of 1988, § 2(3), Pub. L. 100-568, 102 Stat. 2853 (1988) (emphasis added).

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10 The Ad Hoc Working Group included such nationally recognized copyright scholars as Irwin Karp, counsel to the Authors League of America, and Jon A. Baumgarten, counsel to the Association of American Publishers, and former General Counsel of the United States Copyright Office.

E. The Decision Below Improperly Puts United States Law At Odds With That Of Other Berne Convention Member Nations, Contrary To Congress' Intent

The Eighth Circuit's holding also brings the United States into a state of disharmony with other member nations' interpretations of Article 11 *bis* (1)(iii). Writers from all Berne Convention member nations will be denied those compensatory benefits in the United States which are consistently conferred on United States writers throughout the Berne Convention member nations. In its decision to adhere to the Berne Convention, Congress recognized the importance of international uniformity in copyright interpretation. Through its actions and express language, Congress emphasized that the objective of the Berne Union is the "development of the 'effective and harmonious' copyright laws among all nations." H.R. Rep No. 100-609, 100th Cong., 2d Sess., at 20 (1988).

Before acceding to the Berne Convention, members of the Senate Committee on the Judiciary travelled to Geneva, Switzerland and Paris, France to consult with experts on foreign copyright and discuss what statutory changes Congress would have to make to conform the 1976 Copyright Act to the Berne Convention. *Id.* at 9. The trip was the first time the United States ever requested foreign consultation on domestic legislation required to join an international intellectual property treaty. *Id.* Lamentably, the congressional objective of international harmony under the Berne Convention has been undermined by the Eighth Circuit. If the Eighth Circuit's holding is allowed to stand, the United States will be alone in maintaining a radically broad exemption to the author's exclusive right to authorize public performance.

Where uniformity in the international arena is sought, the opinions of "sister signatories [are] entitled to considerable weight." *Air France v. Saks*, 470 U.S. 392, 405 (1985) (citing *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (realizing the importance of international uniformity in interpreting

Articles of the Warsaw Convention). In addition, "[i]t is accepted judicial practice to construe away apparent ambiguities or gaps in implementing legislation by referring to overall treaty principles and policies." Paul E. Geller, *Copyright Protection in the Berne Union: Analyzing the Issues*, 13 Colum.-VLA J.L. & Arts 435, 472 (1989) (citing *Rickless v. United Artists Corp.*, [1987] F.S.R. 362, 371 (British court construing the U.K. Performers' Protection Act, 1963 to grant a private right of action in light of the Rome Convention); *CAPAC, Ltd. v. CTV Television Network, Ltd.*, [1968] S.C.R. 676 (Canadian court referring to Berne texts appended to the Canadian Copyright Act as interpretive aids)). Thus, this Court should consider member nations' obligations in respect of the public performance right.

Berne member nations permit only narrow exemptions to the author's exclusive right to authorize public performance. The performance of a work is exempt from the author's exclusive right of authorization when it is done in private. A number of the courts of member nations have required that, for a performance to be private and thus immune from the author's exclusive right, there should be a "familial intimacy" among those attending the performance. *See* M. Nimmer & P. Geller, *International Copyright Law and Practice* § 8[1][d], at BEL-28 (1991).[11] For example, in The Netherlands, the private performance exemption is a very limited one, with the "private circle" consisting of relatives or friends or persons who may be assimilated to relatives or friends. *Id.* at § 8[2][b], at NETH-63.[12] Thus, the Supreme Court of The Netherlands held that a cafe owner who operated a radio receiver with a loudspeaker on his premises, which were accessible to the public, infringed on the author's

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11 Jan Corbet, Professor and Faculty of Law at the Free University of Brussels authored the Belgium chapter of *International Copyright Law and Practice.*

12 Herman Cohen Jehoram, Professor of Intellectual Property and Information Law at the University of Amsterdam authored The Netherlands chapter of *International Copyright Law and Practice.*

exclusive right to public performance. *Id.* at § 8[1][e], at NETH-60 (citation omitted).

Similarly, in Sweden, "public" rather than private performance occurs if the work leaves the "circle of the author, his closest family, and friends." *Id.* at § 8[1][d], at SWE-35.[13] In France, only performances which occur in the "family circle" are exempt from royalty payments. *Id.* at § 8[b][2][a], at FRA-113-14 (quoting the Law of Copyright of March 1957, art. 41.1).[14] And in the United Kingdom, any performance which is not domestic (within one's home) or "quasi domestic", a narrowly interpreted category, will be deemed public. *Id.* at § 8[1][a][iii], at U.King-56.[15] Thus, the author's exclusive right of public performance in Berne member countries is quite thorough, and only in rare instances will a third-party's use of a broadcast of an author's work not entitle the author to remuneration.

As the foregoing qualified commentators have shown, member nations have not diminished the author's exclusive right of public performance to the drastic extent of the court below. The Eighth Circuit's overexpansion of the sharply limited congressional exemption to the exclusive right of public performance not only ignores clearly stated congressional intent, but violates the obligations of the United States, and puts the United States out of harmony with its sister Berne signatories in respect of United States obligations in adherence to the Berne Convention. Accordingly, the Eighth Circuit's decision should not be allowed to stand.

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13 Dr. Gunnar Karnell, Professor at the Stockholm School of Economics, authored the Sweden chapter of *International Copyright Law and Practice*.

14 Robert Plaisant, Professor Emeritus, Faculty of Law, University of Le Mans, authored the cited portions of the France chapter of *International Copyright Law and Practice*.

15 William R. Cornish, Professor of Law at the University of Cambridge, and External Scientific Member of the Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law, Munich, authored the United Kingdom chapter of *International Copyright Law and Practice*.

Succinctly, for more than a century, this Court has held that the judiciary must defer to the treaty-making and enforcing branches of government in the interpretation of United States treaty commitments. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185-86 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889). In the decision below, the Eighth Circuit contravened this long-standing tenet of treaty construction by setting aside a determination by both the executive and legislative branches regarding the obligations of the United States under the Berne Convention. *Edison Bros.*, 21 U.S.P.Q.2d at 1446.

Congress decided to adhere to the Berne Convention in order to protect United States interests in the international copyright arena. As the world's largest exporter of copyrighted material, Congress regarded United States participation in the Berne Convention as "essential". S. Rep. No. 100-352, 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3709. The House Report on the BCIA states:

> the relationship of Berne adherence to promotion of U.S. trade is clear. American popular culture and information products have become precious export commodities of immense economic value. That value is badly eroded by low international copyright standards. Berne standards are both high, reasonable and widely accepted internationally. Lending our prestige and power to the international credibility of those standards will promote development of acceptable copyright regimes in bilateral and multilateral contexts.

H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 19-20 (1988). Congress concluded that a strong international legal regime would develop as a result of United States adherence to the Berne Convention, benefiting not only proprietary interests but also the public good. *Id.*

Prior to accession, representatives from the United States had attended Berne-related conferences, but only as private

observers, outsiders without any direct voice or influence on the outcome of the deliberations. S. Rep. No. 100-352, 100th Cong., 2d Sess. 4, *reprinted in* 1988 U.S.C.C.A.N. at 3709 (quoting Barbara Ringer, *The Role of the United States in International Copyright—Past and Future*, 56 Geo. L.J. 1050, 1070 (1968)). Congress believed that adherence to the Berne Convention would give the United States a meaningful voice in the development of international copyright, allowing the United States to participate fully in the administration and management of the Convention. S. Rep. No. 100-352, 100th Cong., 2d Sess. 4, *reprinted in* 1988 U.S.C.C.A.N. at 3709. United States court decisions deviating from the Berne Convention jeopardize these goals.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted and the decision of the Court of Appeals should be reversed.

Dated: April 7, 1992

Respectfully submitted,

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